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IN THE
COURT OF APPEALS OF INDIANA

STEVE A. BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0605-CR-246
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0410-MR-193020

June 21, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Steve Brown ("Brown") pleaded guilty in Marion Superior Court to Class A felony voluntary manslaughter. The trial court sentenced him to the presumptive sentence of thirty years. Brown appeals, raising the issue of whether the trial court abused its discretion in failing to give mitigating weight to his guilty plea.

We affirm.

Facts and Procedural History

On October 23, 2004, at approximately 1:45 a.m., the Speedway Police Department received a report of a fight in progress at an apartment complex on Hermitage Way in Marion County. Officers were dispatched to the apartment, where they saw three suspects fleeing from apartment #210 and into the common hallway. The officers detained the suspects, who were later identified as Brown, Chan Reed ("Reed"), and Robert Bell ("Bell").

The officers discovered that Freddie Johnson ("Johnson") was unconscious on the floor of the apartment. He had been shot multiple times in the chest and groin area. Johnson was later pronounced dead at the scene of the crime. Officer Don Cantrell ("Officer Cantrell") handcuffed the suspects for officer safety. While he was being handcuffed, Brown told Officer Cantrell that he had shot Johnson and had placed the gun on the second floor under a doormat. Appellant's App. p. 25. Brown also stated that his brother-in-law, Reed, had nothing to do with the shooting. Id. Officer Cantrell retrieved the gun from the location that Brown had described. The gun was a .40 caliber semiautomatic handgun, and it was later determined that this was the weapon used to kill Johnson.

Brown was read his Miranda rights and transported to the police station by Officer Jim Thiele ("Officer Thiele"). Officer Thiele advised Brown not to talk about the shooting. However, while in the car Brown admitted to shooting Johnson. He said he knew he would be sentenced to life in prison for the crime but that Johnson got what he deserved for pointing a gun at him. Id. at 26. At the police station, Brown was again read his Miranda rights and placed in an interview room so his conversation with Detective Dale Horstman ("Detective Horstman") could be recorded. Brown admitted to Detective Horstman that he had shot Johnson, but again claimed that it was in self-defense. Id. at 27.

Several witnesses talked to the police about the dispute between Brown and Johnson. Reginald Love ("Love"), the leaseholder of apartment #210, and Joseph Woods ("Woods") told the police that they had been hanging out in the apartment with Johnson when Brown arrived. Brown confronted Johnson as Johnson walked out of the bathroom. Brown was apparently still upset about an earlier dispute with Johnson. Brown pulled out a gun and pointed it at Johnson, who then put his hands up in the air. Brown told Johnson that he was from Gary, and he was "hard." Id. Brown also said that he had been drinking and did not care what he did. Id. Brown ordered Johnson to empty his pockets. Reed then intervened and asked Brown to leave the apartment, but Brown refused. Love left the apartment to call 9-1-1 to report the fight. Brown accused Johnson of having more money than he had handed over, and he hit Johnson in the face with the gun. Woods told the police that once Johnson fell to the floor, Brown began to shoot him multiple times. Id.

Nikita Gillis ("Gillis"), a neighbor living in the same apartment complex, confirmed that Brown and Johnson had fought earlier that evening. She told Detective Horstman that she had overheard their fight and saw Brown lift up his shirt to reveal a black handgun sticking out of his waistband. Gillis also overheard Brown tell Johnson that he was going to kill him. Id. at 25.

In October 2004, the State charged Brown with one count of murder, one count of felony murder, and one count of Class A misdemeanor carrying a handgun without a license. Seventeen months later on March 23, 2006, the trial court conducted a guilty plea hearing. At this hearing, the trial court asked Brown "Do you understand that by pleading guilty to this charge you admit that it's true." Tr. p. 7. Brown responded, "I don't got no choice . . . From my understanding, if I don't sign it, if I don't take it, I'm going to get a hundred and something years." Id. at 7-8. The trial court explained to Brown that if he were convicted of murder in a jury trial, he would be facing a sentence between forty-five and sixty-five years, whereas by pleading guilty to voluntary manslaughter, his sentence would be capped at thirty years. Id. at 8. Brown responded, "If it was up to me, I'd rather take my chances with the sixty-five." Id. The trial court then told Brown, "Well, then that's what we'll do. We'll go to trial on Monday." Id. Brown turned to his attorney and explained, "I didn't do it. I ain't taking it, man." Id. at 9. The court then adjourned.

However, the same day, Brown changed his mind. The trial court held Brown's guilty plea hearing later on that same day. Brown pleaded guilty to Class A felony voluntary manslaughter and Class A misdemeanor carrying a handgun without a license.

As part of the plea agreement the State dismissed the charges for murder and felony murder and also agreed to a cap of thirty years on Brown's sentence with the parties free to argue their respective positions as to sentencing. Tr. p. 6.

The trial court conducted a sentencing hearing on April 13, 2006. It found as a mitigating circumstance that Brown's incarceration would cause hardship on his minor children. As an aggravating circumstance, the court found that Brown had a criminal history involving violence and illegal possession of weapons. The trial court sentenced Brown to the presumptive thirty years, which was also the cap under the plea agreement. Brown now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Initially, we note that Brown committed this crime prior to April 25, 2005, when the General Assembly responded to Blakely v. Washington, 542 U.S. 296 (2004) by amending Indiana's sentencing statutes. See Pub.L. No. 71-2005, § 5 (codified at Ind. Code § 35-50-2-1.3). Brown was sentenced after these amendments were passed. This court is divided as to whether the presumptive sentencing scheme or the amended advisory sentencing scheme applies to a crime committed before April 25, 2005, but sentenced after that date. See, e.g. Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied (application of new sentencing statutes to defendants convicted before effective date of amendments, but sentenced afterward, violates prohibition against ex post facto laws); but see Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (change in sentencing statute is procedural rather than substantive;

therefore the sentence was analyzed under the amended statute that provides for advisory rather than presumptive sentences).

Under the presumptive sentencing scheme, if the trial court imposes a sentence in excess of the statutory presumptive sentence, it must identify and explain all significant aggravating and mitigating circumstances and explain its balancing of the circumstances. Rose v. State, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). Although our supreme court has not yet interpreted the amended statute providing for advisory sentences, the plain language of the statute seems to indicate that under the advisory scheme, "a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances." Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied. However, if a trial court does find, identify, and balance aggravating and mitigating factors, it must do so correctly, and we will review the sentencing statement to ensure that the trial court did so. See Ind. Code § 35-38-1-3 ("if the court finds aggravating circumstances or mitigating circumstances, [the trial court shall record] a statement of the court's reasons for selecting the sentence that it imposes"). Therefore, because the trial court here identified and weighed aggravating and mitigating circumstances, the analysis and result are the same under both sentencing schemes, and we need not determine the issue of retroactivity herein. See Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), trans. denied.

Brown contends that the trial court abused its discretion in failing to consider his guilty plea as a mitigating circumstance.[1] Sentencing decisions lie within the sound

[1] We note that Brown did not advance his guilty plea as a mitigating circumstance at the sentencing hearing. We agree with Brown that Indiana Supreme Court precedent dictates that his failure to assert

discretion of the trial judge, and we reverse only for an abuse of that discretion. O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999) (citation omitted). Likewise, "[t]he finding of mitigating factors is not mandatory and rests within the discretion of the trial court." Id. (quoting Wingett v. State, 640 N.E.2d 372, 373 (Ind. 1994)). "[A] judge who imposes the presumptive sentence is under no obligation to explain his reasons through the delineation of the aggravating and mitigating circumstances." Id.; see also Pettiford v. State, 506 N.E.2d 1088, 1090 (Ind. 1987) ("When the basic sentence is imposed, this Court will presume the trial court considered the alternatives."). "A trial court must include mitigators in its sentencing statement *only if* they are used to offset aggravators or to reduce the presumptive sentence, and only those mitigators found to be 'significant' must be enumerated." Allen v. State, 722 N.E.2d 1246, 1252 (Ind. Ct. App. 2000) (emphasis added) (citing Battles v. State, 688 N.E.2d 1230, 1236 (Ind. 1997)).

We recognize that a trial court generally should make some acknowledgment of a guilty plea when sentencing a defendant. Francis v. State, 817 N.E.2d 235, 237-238 (Ind. 2004). However, a guilty plea is not automatically a significant mitigating factor. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). Here, Brown has not met his burden of proving that the mitigating weight of his guilty plea is significant and clearly supported by the record for two abundantly clear reasons. See Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

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this mitigating circumstance cannot result in waiver. See Francis v. State, 817 N.E.2d 235, 237 (Ind. 2004) (concluding that "[b]ecause a sentencing court is inherently aware of the fact that a guilty plea is a mitigating circumstance, the language from Spears [v. State, 735 N.E.2d 1161, 1167 (Ind. 2000), concluding that a defendant forfeits his opportunity to claim on appeal that the court should have considered mitigating circumstance that he failed to assert at sentencing] is not applicable").

First, Brown received a substantial benefit from his plea agreement in that the State dismissed a murder charge and a felony murder charge and agreed to cap his sentence at thirty years, the presumptive for a Class A felony. If he had been convicted of murder at trial, Brown would have faced a minimum sentence of forty-five years. Where, as in this case, the defendant reaps a substantial benefit from a plea agreement, his guilty plea does not constitute a mitigating circumstance. Sensback, 720 N.E.2d at 1165.

Second, Brown's guilty plea did not extend a significant benefit to the State, as Brown contends. At the sentencing hearing, the trial court noted that Brown decided to plead guilty on almost the eve of trial as the trial was scheduled for Monday, March 27th and Brown did not plead guilty until March 23rd. Tr. p. 4. Brown pleaded guilty seventeen months after he was charged. During this delay, the State was involved in substantial discovery and preparations for the scheduled jury trial. Because of this long delay, Brown did not extend a substantial benefit to the State by pleading guilty. See Francis, 817 N.E.2d at 238 n.3 (citing Sensback, 720 N.E.2d at 1165 n.4).

Furthermore, Brown's guilty plea does not demonstrate his remorse for committing this crime. See id. In fact, the day of his guilty plea hearing, he initially withdrew his plea, telling his lawyer "I didn't do it." Tr. p. 9. Brown stated that he would rather take his chances with receiving the maximum sixty-five year sentence in a jury trial. Tr. p. 8. After a recess, Brown reappeared before the trial court with a change of heart and pleaded guilty.

However, even after his guilty plea Brown demonstrated no remorse for his actions. At the sentencing hearing, while the State was reviewing the evidence supporting the conviction, Brown made several comments, such as "I didn't say that" and "Did none of that even happen like that." Id. 57. This certainly does not demonstrate remorse or acceptance of responsibility. See Sensback, 720 N.E.2d at 1164. Given the substantial benefit Brown received from the plea agreement, the lack of a substantial benefit extended to the State by his plea agreement, as well as Brown's lack of remorse for committing this crime, we cannot agree that the trial court abused its discretion in failing to consider Brown's guilty plea as a mitigating circumstance.

Affirmed.

NAJAM, J., concurs.

MAY, J., concurs in result.